A **DATUK MOHD ALI HJ ABDUL MAJID & ANOR**

v.

PUBLIC BANK BHD

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
AHMAD MAAROP FCJ
C ZALEHA ZAHARI FCJ
[CIVIL APPEAL NO: 02(i)-24-05-2013(M)]
22 MAY 2014

D ***CIVIL PROCEDURE:*** *Damages - Claim for - Breach of duty of care - Defendants sued for negligence in performance of services - Whether sufficient for plaintiff to merely state amount of damages claimed - Burden of proof on plaintiff to prove damages - Plaintiff applied to enter summary judgment against defendants under O. 14 Rules of the High Court 1980 - Whether liability established or admitted by defendant -*
E *Whether ascertained damages a debt indisputably due - Whether court should enter interlocutory judgment with damages to be assessed*

CIVIL PROCEDURE: *Appeal - Law, question of - Party seeking to claim for damages - Defendants sued for negligence in performance of*
F *services - Whether sufficient for plaintiff to merely state amount of damages claimed - Burden of proof on plaintiff to prove damages - Plaintiff applied to enter summary judgment against defendants under O. 14 Rules of the High Court 1980 - Whether liability established or admitted by defendant - Whether ascertained damages a debt indisputably*
G *due - Whether court should enter interlocutory judgment with damages to be assessed*

LEGAL PROFESSION: *Duty of care - Breach of - Defendants sued for negligence in performance of services - Claim for damages - Whether sufficient for plaintiff to merely state amount of damages claimed -*
H *Burden of proof on plaintiff to prove damages - Plaintiff applied to enter summary judgment against defendants under O. 14 Rules of the High Court 1980 - Whether liability established or admitted by defendant - Whether ascertained damages a debt indisputably due - Whether court should enter interlocutory judgment with damages to be assessed*

I

The plaintiff/respondent bank had appointed the appellants/ defendants, who were advocates and solicitors, to commence legal proceedings to recover outstanding amounts under the overdraft loan facility extended to ODA Holdings (M) Development Corporation Sdn Bhd ('ODA'). The defendants instituted legal proceedings against ODA and its guarantors and obtained judgment in default of defence against the parties for the sum of RM614,690.07 ('the first judgment') and RM248,375.60 ('the second judgment'). Ten years after the judgments were obtained, the plaintiff instructed the defendants to enforce the judgments against ODA. The defendants then issued notices of demand against ODA demanding, *inter alia*, payments of the amount outstanding. Based on ODA's failure to make the said payments, the defendants presented a winding up petition against ODA ('the petition'). ODA opposed the petition on the ground that the plaintiff had claimed for an outstanding amount under judgments which included arrears of interest accrued more than six years. The High Court accepted ODA's objection and dismissed the petition. The plaintiff then instructed the defendants to recommence fresh winding up proceedings against ODA. The defendants advised the plaintiff that it was unable to issue a fresh statutory demand pursuant to s. 218 of the Companies Act 1965 against ODA nor take any action to enforce the judgment as the same was statute barred under s. 6(3) of the Limitation Act 1953. In the High Court, the plaintiff, in suing the defendants for breach of the terms, conditions and warranties of their appointment and negligence in the performance of their services, prayed for, *inter alia* damages to be assessed against the defendants. Subsequently, the plaintiff applied for leave to enter summary judgment against the defendants pursuant to O. 14 of the Rules of the High Court 1980 ('the RHC 1980') ('the O. 14 application'), which was allowed by the Deputy Registrar. The defendants appealed to the judge in chambers. The judge in chambers, in allowing the appeal, ordered that damages payable by the defendants to the plaintiff be assessed. Aggrieved, the plaintiff appealed against the High Court decision on the issue of quantum. The Court of Appeal allowed the plaintiff's appeal and affirmed the decision of the Deputy Registrar. Thus, this appeal against the decision of the Court of Appeal. The defendants were granted leave to appeal on the following question of law: whether, in a case where the claim was

for unliquidated damages and/or general damages; and (i) the plaintiff applied to enter summary judgment pursuant to O. 14 of the RHC 1980; (ii) liability was established or admitted by the defendant; and (iii) ascertained amount/damages was not a debt which was indisputably due, the court should only enter interlocutory judgment with such damages to be assessed.

Held (allowing appeal with costs)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. The burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him (s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action. Therefore, in a claim for damages, it was not sufficient for the plaintiff to merely state the amount of damages that he was claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. (paras 32 & 33)

(2) The claim by the plaintiff herein was for general and special damages arising out of a breach of contract and/or negligence. Therefore, the burden rested on the plaintiff to prove the damages. It was not sufficient for the plaintiff to merely assert that he had suffered such damages without proving it. The High Court Judge was correct in ordering that summary judgment be entered on liability with damages to be assessed. Thus, the answer to the question posed was in the positive. The order of the Court of Appeal was set aside. (paras 34 & 35)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden bank telah melantik perayu-perayu/defendan-defendan, peguambela dan peguamcara, untuk memulakan tindakan prosiding undang-undang bagi mendapatkan semula jumlah tertunggak di bawah kemudahan pinjaman overdraf yang telah diberikan kepada ODA Holdings (M) Development Corporation Sdn Bhd ('ODA'). Defendan-defendan melaksanakan prosiding

undang-undang terhadap ODA dan penjamin-penjaminnya dan memperolehi penghakiman ingkar pembelaan terhadap pihak-pihak tersebut untuk jumlah RM614,690.07 ('penghakiman pertama') dan RM248,375.60 ('penghakiman kedua'). Sepuluh tahun selepas penghakiman-penghakiman itu diperoleh, plaintif mengarahkan defendan-defendan menguatkuasakan penghakiman-penghakiman itu terhadap ODA. Defendan kemudiannya mengeluarkan notis tuntutan terhadap ODA menuntut, antara lain, bayaran jumlah tertunggak. Berdasarkan kegagalan ODA untuk membuat bayaran tersebut, defendan-defendan menyampaikan petisyen penggulungan terhadap ODA ('petisyen'). ODA membantah petisyen tersebut atas alasan bahawa plaintif telah menuntut jumlah tertunggak di bawah penghakiman yang termasuk tunggakan faedah yang terakru lebih daripada enam tahun. Mahkamah Tinggi menerima bantahan ODA dan menolak petisyen tersebut. Plaintif kemudiannya mengarahkan defendan-defendan memulakan prosiding penggulungan yang baru terhadap ODA. Defendan-defendan menasihatkan plaintif bahawa ia tidak dapat mengeluarkan tuntutan statutori yang baru di bawah s. 218 Akta Syarikat 1965 terhadap ODA dan tidak boleh mengambil apa-apa tindakan untuk menguatkuasakan penghakiman kerana ia juga dihadkan masa di bawah s. 6(3) Akta Had Masa 1953. Di Mahkamah Tinggi, plaintif, dalam menyaman defendan-defendan untuk pelanggaran terma, syarat dan jaminan perlantikan mereka serta kecuaian dalam pelaksanaan perkhidmatan mereka, memohon, antara lain, ganti rugi untuk ditaksirkan terhadap defendan-defendan. Kemudiannya, plaintif memohon kebenaran untuk memasukkan penghakiman terus terhadap defendan-defendan menurut A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') ('permohonan A. 14'), yang dibenarkan oleh Timbalan Pendaftar. Defendan-defendan merayu kepada hakim dalam kamar. Hakim dalam kamar, dalam membenarkan rayuan itu, membuat perintah supaya ganti rugi yang dibayar oleh defendan kepada plaintif harus ditaksirkan. Tidak berpuas hati, plaintif merayu terhadap keputusan Mahkamah Tinggi tersebut atas isu kuantum. Mahkamah Rayuan membenarkan rayuan perayu dan mengesahkan keputusan Timbalan Pendaftar. Oleh itu, rayuan ini terhadap keputusan Mahkamah Rayuan. Defendan-defendan diberikan kebenaran untuk merayu atas persoalan undang-undang: sama ada dalam kes di mana tuntutan adalah untuk ganti rugi jumlah tak tertentu dan/atau ganti rugi am; dan (i) plaintif telah memohon untuk memasukkan penghakiman terus menurut A. 14 KMT; (ii) liabiliti dibuktikan atau diakui oleh

defendan; dan (iii) ganti rugi tidak dipastikan adalah bukan hutang yang mana tidak dapat dipertikaikan dijangka, mahkamah harus memasukkan penghakiman interlokutori dengan ganti rugi ditaksirkan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Pemohon mempunyai beban membuktikan kedua-dua liabiliti dan kuantum ganti rugi, sebelum dia boleh mendapatkan jumlah yang dituntut. Beban membuktikan fakta adalah atas orang yang mendakwa dan bukan atas orang yang menafikannya, dengan itu, di mana dakwaan membentuk bahagian penting dalam kes seseorang, pembuktian dakwaan terletak ke atasnya (s. 103 Akta Keterangan 1950). Jika pemohon gagal membuktikan kedua-dua liabiliti dan kuantum ganti rugi, adalah tidak memadai untuk plaintif hanya menyatakan jumlah ganti rugi yang dituntutnya, dia harus membuktikan kerugian yang dialaminya dengan memuaskan hati mahkamah.

(2) Tuntutan plaintif adalah untuk ganti rugi am dan khas yang berbangkit daripada pelanggaran kontrak dan/atau kecuaian. Oleh itu, beban adalah atas plaintif untuk membuktikan kerugian. Adalah tidak memadai untuk plaintif hanya menegaskan bahawa dia telah mengalami kerugian tetapi tidak membuktikannya. Hakim Mahkamah Tinggi adalah betul apabila membuat perintah supaya penghakiman terus dimasukkan atas liabiliti dengan ganti rugi ditaksirkan. Dengan itu, jawapan kepada soalan yang telah dikemukakan adalah dijawab dengan positif. Perintah Mahkamah Rayuan diketepikan.

Case(s) referred to:
Bolag v. Hutchison [1905] AC 515 ***(refd)***
Bonham-Carter v. Hyde Park Hotel [1948] 64 TLR 177 ***(refd)***
Dummer v. Brown and Another [1953] 1 QB 710 ***(refd)***
Livingstone v. Rawyards Coal Co [1880] 5 App Cas 25 ***(refd)***
Tan Ah Chim & Sons Sdn Bhd lwn. Lim Kean Siew Dan Lain-Lain [2000] 1 LNS 206 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 ***(refd)***
The Susquehanna [1926] AC 655 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218
Evidence Act 1950, s. 103
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 14 r. 1(2)

For the appellants - Ranjit Singh (CK Yeoh & Jamie Wong with him); M/s Ranjit Singh & Yeoh
For the respondent - Goh Meng Yew; M/s Iza Ng Yeoh & Kit

[Editor's note: For the Court of Appeal judgment, please see Public Bank Berhad v. Datuk Mohd Ali Abdul Majid & Anor [2011] 1 LNS 1904.]

Reported by Suhainah Wahiduddin

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] This is an appeal against the decision of the Court of Appeal dated 25 October 2011 which allowed the respondent's appeal against the decision of the High Court with costs. This court had on 17 April 2013 granted the appellants leave to appeal on the following question of law:

> Where, in a case where the claim is for unliquidated damages and/or general damages; and
>
> (i) plaintiff applies to enter summary judgment pursuant to Order 14 of the Rules of the High Court 1980, and
>
> (ii) liability is established or admitted by the defendant, and
>
> (iii) unascertained amount/damages is not a debt which is indisputably due
>
> whether the court should only enter interlocutory judgment with such damages to be assessed?

[2] In this judgment, the appellants will be referred to collectively as the defendants and the respondent as the plaintiff, as they were in the High Court.

The Facts

[3] The plaintiff is a company duly incorporated in Malaysia under the Companies Act 1965 carrying on the business of a bank with its registered address at 27th Floor, Menara Public Bank, 146 Jalan Ampang, 50450 Kuala Lumpur.

[4] The first and second defendants were at all material times advocates and solicitors carrying on their practice in partnership under the name and style of Messrs Mohd Ali & Co.

[5] Sometime in May 1986, the plaintiff appointed the defendants to commence legal proceeding to recover outstanding amounts under the overdraft loan facility, fixed loan and trust receipt facility extended to ODA Holdings (M) Development Corporation Sdn Bhd ("ODA") pursuant to the plaintiff's letters of offer dated 7 January 1985 and 26 February 1985, and against Ong Ah Sim @ Ong Swee Hoe and Abdullah bin Ahmad as guarantors for ODA under a letter of guarantee dated 8 March 1985.

[6] Pursuant to the instructions of the plaintiff, the defendants then instituted two legal proceedings against ODA and the guarantors *vide* Malacca High Court Civil Suit No: 23-121-1986 ("the 121 suit") and Malacca High Court Civil Suit No: 23-122-1986 ("the 122 suit").

[7] On 10 April 1987, the defendants obtained:

(i) Judgment in default of defence against ODA and the guarantors in the 121 suit for, *inter alia*, the sum of RM614,690.07 together with interest at the rate of 16.25% per annum till full payment ("the first judgment"); and

(ii) Judgment in default of defence against ODA and the guarantors in the 122 suit for, *inter alia*, the sum of RM248,375.60 together with interest at the rate of 14.5% per annum till full payment ("the second judgment").

(Referred to herein as "the judgments")

[8] Nearly ten years after the judgments were obtained, ie, sometime in March 1998, the plaintiff *vide* letter dated 6 March 1998 instructed the defendants to enforce the judgments against

ODA. The letter also enclosed the statement of account with interest calculated up to 28 February 1998, the material part reads:

Statement of Account
M/s Oda Holdings (Malaysia) Development Sdn Bhd

Malacca High Court C.S. No. 23-121-1986 – for Overdraft facility

Judgment Sum	614,690-07
Interest from 1-11-86 to 28-2-98	1,134,952-78
Less Payments	850,452-72
	899,190-13

Malacca High Court C.S. No. 23-122-1986 – for Fixed Loan Facility

Judgment Sum	248,375-60
Interest from 1-11-86 to 28-2-98	323,970-67
Less Payments	332,182-08
	240,164-19

[9] The statement of account showed that the said amount included arrears of interest which had accrued on the judgments more than six years after 1 November 1986 (the date on which the interest became due as per court order dated 10 April 1987).

[10] The defendants then on 17 March 1998 issued against ODA:

(a) A notice pursuant to s. 218 of the Companies Act 1965 dated 17 March 1998 demanding from ODA within 21 days of the date thereof the payment of RM899,190.13, being the amount outstanding under the first judgment inclusive of interest from 1 November 1986 till 28 February 1998 failing which a winding up petition would be presented against ODA ("the first s. 218 notice"); and

(b) A notice pursuant to s. 218 of the Companies Act 1965 dated 17 March 1998 demanding from ODA within 21 days of the date thereof the payment of RM240,164.19, being the amount outstanding under the second judgment inclusive of interest from 1 November 1986 till 28 February 1998, failing which a winding up petition would be presented against ODA ("the second s. 218 notice").

[11] ODA ignored the notice of demand. Based on ODA's failure to make payment of the said amount of RM899,190.13 under the first judgment within the statutory period despite the first s. 218 notice, the defendants then presented a winding up petition against ODA *vide* Malacca High Court Winding-Up Petition No: 28-23-1998 ("the petition").

[12] ODA opposed the petition on the ground that the plaintiff had claimed for an outstanding amount under the first judgment which included arrears of interest accrued more than six years after 1 November 1986. On that premise, ODA contended that the first s. 218 notice was bad in law and the petition ought to be dismissed.

[13] On 22 June 1999, the High Court accepted the aforesaid objection by ODA and dismissed the petition with costs.

[14] The plaintiff then instructed the defendants to recommence fresh winding up proceedings against ODA *vide* its letter dated 16 August 1999. The defendants then advised the plaintiff *vide* their letter dated 18 August 1999 that the plaintiff was unable to issue a fresh statutory demand pursuant to s. 218 of the Companies Act 1965 against ODA nor take any action to enforce the judgment as the same was statute-barred under s. 6(3) of the Limitation Act 1953.

[15] ODA's solicitors subsequently filed their bill of costs in respect of the decision dated 22 June 1999. On 19 January 2000, the Registrar awarded the sum of RM23,254.08 as the taxed costs inclusive of allocator fees.

[16] On 10 April 2000, ODA's solicitors, accompanied by the court bailiff, went to the plaintiff's branch office at No. 60-62, Jalan Laksamana, Melaka with a writ of seizure and sale to attach and seize the chattels of the plaintiff on the said premises.

On 11 April 2000, the plaintiff paid to ODA's solicitors the total sum of RM24,695.64 inclusive of interest on the taxed sum and the costs of the writ of seizure and sale.

High Court

[17] On 13 January 2004, the plaintiff *vide* Malacca High Court Civil Suit No: 2-22-8-2004 sued the defendants for breach of the terms, conditions and warranties of their appointment and negligence in the performance of their services. The plaintiff prayed for the following reliefs:

(a) Damages of RM899,190.13 or in the alternative, damages to be assessed against the Defendants;

(b) Interest at the rate of eight per cent (8%) per annum on the sum of the damages awarded under prayer (a) hereinabove from the date of the filing of this Statement of Claim till the date of full and final realisation;

(c) RM26,202.55;

(d) Interest at the rate of eight per cent (8%) per annum on RM26,202.55 from the date of the filing of this Statement of Claim till the date of full and final realisation;

(e) RM13,691.70 which was charged by the Defendants as legal fees and which was paid to the Defendants as such;

(f) Interest at the rate of eight per cent (8%) per annum on RM13,691.70 from the date of the filing of this Statement of Claim till the date of full and final realisation;

(g) Costs of this action; and

(h) Such further or other relief as this Honourable Court deems fit and proper to grant.

[18] Defence was filed on 13 April 2005.

[19] On 31 May 2005, the plaintiff applied for leave to enter summary judgment against the defendants pursuant to O. 14 of the Rules of the High Court 1980 ("the RHC") ("the O. 14 application").

[20] On 28 June 2006, the learned Deputy Registrar allowed the O. 14 application and entered final judgment for the amount as prayed on the basis that there was no affidavit in reply filed by the defendants and no submission filed by learned counsel for the defendants.

[21] The defendants then appealed to the judge in chambers. On 27 November 2008, the learned judge allowed the defendants' appeal and set aside the order of the learned Deputy Registrar dated 28 June 2006. The learned judge ordered that damages payable by the defendants to the plaintiff be assessed. In allowing the defendants' appeal, the learned judge had this to say:

> Permohonan plaintif di bawah A. 14
>
> Kaedah-Kaedah Mahkamah 1980
>
> Defendan-defendan tidak menjawab afidavit sokongan di bawah Permohonan Penghakiman Terus. Mengikut A. 14 k. 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 dan undang-undang matan (trite), defendan-defendan bertanggungjawab untuk menimbulkan isu atau isu-isu yang perlu dibicarakan. Kegagalan defendan-defendan memfailkan afidavit jawapan dan juga gagal memfailkan hujah bertulis menyebabkan Timbalan Pendaftar tiada pilihan selain daripada membenarkan permohonan plaintif untuk Penghakiman Terus.
>
> Isu seterusnya mengenai gantirugi. Tuntutan plaintif pada asasnya berdasarkan kepada kecuaian/negligence.
>
> …
>
> Afidavit sokongan tersebut tidak memberi butir-butir terperinci secara spesifik bagaimana tuntutan plaintif RM899,190.13 diperolehi.
>
> Walaupun eksibit di bawah afidavit tersebut melampirkan statement of account, ianya dialamat kepada defendan untuk tuntutan terhadap ODA Holdings (M) Development Corp. Sdn Bhd dan bukan tuntutan terhadap defendan sendiri. Statement of account tersebut tidak dinyatakan siapakah yang menyediakannya. Surat iringan ditandatangan oleh seorang bernama Chan Sow Leng, manakala afidavit sokongan (kandungan (24)) dibuat oleh seorang bernama Christopher Niap Tien Choy.
>
> Atas alasan ini saya memutuskan gantirugi ini perlu ditaksirkan di hadapan Timbalan Pendaftar.
>
> Gantirugi Kedua:
>
> RM26,202.55 tiada keterangan bahawa jumlah ini sebenarnya telah dibayar oleh plaintif. Tiada afidavit atau resit bayaran dikemukakan.

Gantirugi Ketiga:

RM13,691.70 bayaran 'retainer' yang dibayar oleh plaintif kepada defendan. Sekali lagi tiada affidavit atau resit bayaran sebenarnya telah dibuat oleh plaintif kepada defendan.

Keduanya samada plaintif boleh menuntut kembali bayaran ini untuk perkhidmatan yang diberikan oleh defendan.

Saya bersetuju dengan hujah peguam defendan bahawa perkhidmatan telah diberi; dengan itu bayaran 'retainer' tidak boleh dituntut semula 'irrespective' kecuaian yang dikatakan berlaku. Gantirugi teladan tidak diplidkan.

Gantirugi perlu diplidkan secara specifik dan juga perlu dibuktikan secara spesifik. Plaintif tidak boleh 'lemparkan' kepada Mahkamah: ini kerugian saya dan saya minta mahkamah arahkan defendan bayar. Plaintif masih perlu buktikan kerugian tersebut.

Atas alasan-alasan di atas, saya membenarkan sebahagian rayuan iaitu kerugian perlu ditaksirkan oleh Timbalan Pendaftar.

Court Of Appeal

[22] Aggrieved, the plaintiff appealed against the decision of the High Court to the Court of Appeal. The appeal was only on the issue of quantum. On 25 October 2011, the Court of Appeal allowed the plaintiff's appeal and affirmed the decision of the learned Deputy Registrar.

[23] In allowing the plaintiff's appeal, Jeffrey Tan Kok Wha (JCA), as he then was, ruled as follows:

… But with respect to the learned Judge, we fail to see how it could be held that the claim was not fully particularised, when the learned Judge was able, to the contrary, to reproduce the particulars of the claim for RM899,190.13 in his grounds of judgment (see 133AR) from the particulars stated by the Appellant at paragraph 19 of the affidavit in support at 200AR, which particulars were, in our opinion, clearly more than sufficient particulars of the claim for the said RM899,190.13.

In relation to the claim of RM26,202.55 that the Appellant paid to ODA Holdings as legal costs and for the refund of RM13,691.70 that the Appellant paid to the Respondents as professional fees, the learned Judge held that there was no evidence that those legal costs and or professional fees had been paid (see 134AR). But again with respect to the learned Judge,

A we fail to see how we could support that finding, for contrary to the finding of the learned Judge the Appellant had clearly affirmed that legal costs were paid to ODA Holdings (see paragraph 29 of the affidavit in support at 207AR) and that professional fees were paid to the Respondents (see paragraph 32(iv) of the affidavit in support at 218AR).

B

Suffice it to say that that we find all reasons of the learned Judge to order assessment of damages could not be sustained. The quantum of loss of the Appellant was known and proved, by the judgment against ODA Holdings, by the quantum stated in the C section 218 notices and by the unchallenged averments in the affidavit in support. We absolutely see no case for damages to be assessed.

For those reasons, we unanimously (i) allow this appeal with costs in the sum of RM10,000.00 to the Appellant who would be D entitled to a refund of the deposit, (ii) set aside the order of assessment of damages, and (iii) affirm the summary judgment as ordered by the learned Senior Assistant Registrar.

Plaintiff's Submissions

E **[24]** Learned counsel for the plaintiff submitted that the defendants in the present case failed to file any affidavit in reply to the plaintiff's application under O. 14 of the RHC negating the plaintiff's allegation that the damage was caused by their negligence and breach of contract. He contended that this failure F in essence meant that the defendants are deemed to have admitted such allegation. Therefore, there was no need for the plaintiff to prove nor to particularise the quantum of the damages payable by the defendants.

G **[25]** Learned counsel for the plaintiff further contended that the defendants in the present case did not dispute the quantum of damages suffered by the plaintiff in the sum of RM899,190.13 as the defendants' statement of defence merely makes bare denial of the quantum of damages. He also submitted that in an O. 14 H application, the burden is on the defendant to show why judgment should not be entered and it is not for the plaintiff to prove the damage. On those grounds, he contended that the judgment was correctly entered by the learned Deputy Registrar.

I **[26]** It is further submitted by learned counsel for the plaintiff that O. 14 of the RHC does not make any distinction between a liquidated sum and an unliquidated sum. Instead, O. 14 applies

the same test for both types of claim. As long as the cause of action does not fall within O. 14 r. 1(2) (ie, libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, or a claim based on an allegation of fraud), the plaintiff may apply for summary judgment under O. 14 in its entirety and there is no requirement to assess the damages for 'unliquidated' claim.

Defendants' Submissions

[27] In reply, learned counsel for the defendants submitted that the defendants had never disputed the liability and for that reason they did not file any affidavit in reply. However, he submitted that damages must be assessed by the court. The plaintiff cannot merely rely on the judgment entered against ODA and claim the judgment sum against the defendants. The plaintiff must show to the court that but for the defendant's negligence, the plaintiff would have been able to recover the judgment sum or any part thereof.

[28] In the present case, the plaintiff must prove that at the material time the judgment debtor is solvent and has the means to satisfy the judgment sum. Learned counsel for the defendants argued that if the plaintiff is only able to show that the judgment debtor is only able to pay 50% of the judgment sum, then that is the amount of damages that the plaintiff is entitled to, and if the plaintiff fails to prove that the judgment debtor is able to satisfy the judgment sum or any part thereof, then the plaintiff is only entitled to nominal damages.

[29] Learned counsel for the defendants further submitted that the Court of Appeal fell into error in allowing final judgment for the sum claimed. He contended that the sum of RM899,190.13, though quantified by the plaintiff, is a claim in the nature of general damages. In the circumstances only an interlocutory judgment ought to have been entered with damages to be assessed, as ordered by the learned High Court Judge.

Our Findings

[30] The principal issue in this appeal is whether a summary judgment may be entered for the amount as prayed for in the statement of claim and as affirmed in the affidavit in support without the need for any assessment. The claim by the plaintiff in this case is for damages arising out of the defendants' breach of contract and/or negligence.

[31] The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered. The general principle governing the measure of damages has its origin in the words of Lord Blackburn in *Livingstone v. Rawyards Coal Co* [1880] 5 App Cas 25 where he said:

> … that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him. (See s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.

[33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. This principle is borne out in the case of *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177 where Lord Goddard CJ observed:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

This statement was cited with approval by Edgar Joseph JR FCJ in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777.

[34] The claim by the plaintiff in the present case is for general and special damages arising out of breach of contract and/or negligence. Therefore, the burden rests on the plaintiff to prove the damages and it is not sufficient for the plaintiff to merely assert that he had suffered such damages without proving it. (See *The Susquehanna* [1926] AC 655 and *Bolag v. Hutchison* [1905] AC 515). In the circumstances, we hold that the learned High Court

Judge was right in ordering that summary judgment be entered on liability with damages to be assessed. (See *Dummer v. Brown and Another* [1953] 1 QB 710; *Tan Ah Chim & Sons Sdn Bhd lwn. Lim Kean Siew Dan Lain-Lain* [2000] 1 LNS 206; [2000] 6 MLJ 670).

Conclusion

[35] For the above reasons, we would answer the question posed to us in the positive. Accordingly, the appeal is allowed with costs here and in the courts below. The order of the Court of Appeal is set aside and the order of the learned High Court Judge is reinstated. The case is remitted to the High Court for assessment of damages.